RECORD AND BRIEFS

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IN THE
Supreme Court of the United States

MICROSOFT CORPORATION,

Petitioner,

v.

SETH BAKER, ET AL.,

Respondents.

On Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE AMERICAN TORT REFORM ASSOCIATION, AND THE RETAIL LITIGATION CENTER, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. The Ninth Circuit's Voluntary Dismissal Rule Cannot Satisfy the Requirements of Either Article III or Section 1291. 6

A. Plaintiffs' Dismissal With Prejudice Moots Their Appeal 7

B. Section 1291's Finality Requirement Is Not Satisfied If Plaintiffs May Revive Their Claims. 11

II. The Ninth Circuit's Voluntary Dismissal Rule Wastes Judicial Resources and Distorts Class Action Practice. 14

A. The Ninth Circuit's Voluntary Dismissal Rule Suffers from the Same Flaws as the Death Knell Doctrine. 14

B. The Ninth Circuit's Rule Upsets the Balance Struck by Federal Rule of Civil Procedure 23(f). 18

III. The Ninth Circuit's Voluntary Dismissal Rule Cannot Be Saved By Allowing Plaintiffs To Pursue Appeal After a Permanent Dismissal of Their Claims. 22

CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

Cases

Am. Elec. Power Co. v. Connecticut,
131 S. Ct. 2527 (2011) 2

Arizonans for Official English v. Arizona, 520 U.S. 43 (1997) 8

AT&T Mobility LLC v. Concepcion,
131 S. Ct. 1740 (2011) 17

Blair v. Equifax Check Servs., Inc.,
181 F.3d 832 (7th Cir. 1999) 20

Camesi v. Univ. of Pitt. Med. Ctr.,
729 F.3d 239 (3d Cir. 2013)..... 7, 8, 10, 16

Chamberlan v. Ford Motor Co.,
402 F.3d 952 (9th Cir. 2005) 19

Coopers & Lybrand v. Livesay,
437 U.S. 463 (1978) .....*passim*

Deakins v. Monaghan,
484 U.S. 193 (1988) 8

Deposit Guar. Nat'l Bank v. Roper,
445 U.S. 326 (1980) 10

Eisen v. Carlisle & Jacquelin,
417 U.S. 156 (1974) 12

Fairley v. Andrews,
578 F.3d 518 (7th Cir. 2009) 7

Gardner v. Westinghouse Broad. Co,
437 U.S. 478 (1978) 10

Moses H. Cone Mem. Hosp. v. Mercury Const., 460 U.S. 1 (1983) 9

Nashville, Chattanooga & St. Louis Ry. v. United States, 113 U.S. 261 (1885) 7

O'Shea v. Littleton,
414 U.S. 488 (1974) 10

Page Plus of Atlanta, Inc. v. Owl Wireless, LLC, 733 F.3d 658 (6th Cir. 2013) 8

Rhodes v. E.I. du Pont de Nemours & Co., 636 F.3d 88 (4th Cir. 2011) 10

Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497 (2001) 9

Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393 (2010) 17

Summers v. Earth Island Inst.,
555 U.S. 488 (2009) 7, 10

United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980) 11, 24

United States v. Procter & Gamble Co.,
356 U.S. 677 (1958) 7, 8, 9

Williamson v. Mazda Motor of Am., Inc.,
131 S. Ct. 1131 (2011) 2

Woodard v. STR Corp.,
170 F.3d 1043 (11th Cir. 1999) 7

Statute and Rule

28 U.S.C. § 1291 ..... *passim*

Fed. R. Civ. P. 23(f) ..... *passim*

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John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 Colum. L. Rev. 370, 371 (2000) 24

INTEREST OF THE *AMICI CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country.[1] A central function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts, including this Court. To that end, the Chamber regularly files amicus briefs in cases that raise issues of vital concern to the nation's business community, including in cases involving important issues of class action practice and procedure. *See, e.g.*, *Tyson Foods, Inc. v. Bouaphakeo*, No. 14-1146 (filed Aug. 14, 2015); *Campbell-Ewald Co. v. Gomez*, No. 14-857 (filed July 23, 2015); *Spokeo, Inc. v. Robins*, No. 13-1339 (filed July 9, 2015).

The American Tort Reform Association ("ATRA") is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring

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[1] Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored the brief in whole or in part, that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than the *amici*, their counsel, or their members made such a monetary contribution. The parties' consents to the filing of this brief are on file with the Clerk's office.

fairness, balance, and predictability in civil litigation. For over two decades, ATRA has filed amicus curiae briefs in cases before this Court and other federal and state courts addressing issues of importance to its members. *See, e.g.*, *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011); *Williamson v. Mazda Motor of Am., Inc.*, 131 S. Ct. 1131 (2011).

The Retail Litigation Center, Inc. ("RLC") is a public policy organization that identifies and engages in legal proceedings that affect the retail industry. The RLC's members include many of the country's largest and most innovative retailers. The member entities whose interests the RLC represents employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues, and to highlight the potential industry-wide consequences of significant pending cases.

Businesses are regularly named as defendants in class actions. The Chamber, ATRA, and RLC, as well as their members, have a strong interest in ensuring that the courts correctly apply the federal law governing appeals of class certification decisions. By failing to do that here, the Ninth Circuit has allowed class-action plaintiffs to take immediate appeals of orders denying class certification even in cases where the requirements for interlocutory appeal under Federal Rule of Civil Procedure 23(f) have not been met. That rule upsets the balance struck by Rule 23(f), allows prolonged litigation of unwarranted class action lawsuits, and harms *amici*'s members.

INTRODUCTION AND SUMMARY OF ARGUMENT

Federal law expressly provides a method for parties to seek immediate appellate review of a class certification order. *See* Fed. R. Civ. P. 23(f). Under Rule 23(f), a party can petition for interlocutory review of the order, and the court of appeals has discretion to take the appeal and review the class certification order prior to final judgment. *Id.* Importantly, Rule 23(f) applies to orders both granting and denying class certification, and thus the rule makes appellate review available on the same terms to both plaintiffs and defendants.

The Ninth Circuit provides plaintiffs in a putative class action with an additional method for obtaining immediate appellate review of an order denying class certification.[2] Under the Ninth Circuit's voluntary dismissal rule, a plaintiff may forgo litigating her claims on the merits and take an immediate appeal of an order denying class certification by voluntarily dismissing the claims with prejudice and then appealing under 28 U.S.C. § 1291. Unlike an appeal under Rule 23(f), the court of appeals has no discretion to decline jurisdiction over the appeal. And because this tactic depends on dismissing the claims—something a defendant cannot do—this method for obtaining immediate appellate review is available only to plaintiffs.

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[2] As this case demonstrates, the Ninth Circuit applies the same rule when the court grants a defendant's motion to strike class allegations from the complaint. Pet. App. 12a.

This is not the first time that a court of appeals has allowed plaintiffs to appeal an order denying class certification as a final decision under Section 1291. In the 1970s, several courts of appeals adopted the "death knell" doctrine, which treated a class certification denial as a final decision whenever the order made it "economically imprudent" for the plaintiff to litigate his individual claims. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978). In rejecting the death knell doctrine, this Court noted that the doctrine wasted judicial resources by encouraging piecemeal appeals, and that it unfairly disadvantaged defendants, who had no similar right to an immediate appeal of orders granting class certification. *Id.* at 470-74. The Ninth Circuit's voluntary dismissal rule not only suffers from the same policy flaws as the death knell doctrine, but also ignores basic principles of appellate jurisdiction.

I. When a plaintiff dismisses her claims with prejudice, there is no longer a live "case or controversy," as required by Article III of the U.S. Constitution. A plaintiff who dismisses her own claims with prejudice has no right to challenge that dismissal on appeal and therefore has no further personal stake in the outcome of the litigation. Applying this black-letter law, Plaintiffs' dismissal of their own claims with prejudice in this case should have deprived the Ninth Circuit of jurisdiction to decide Plaintiffs' appeal.

Plaintiffs contend that they can dismiss their claims "with prejudice" but then later "revive" those claims on remand if they prevail on appeal. Br. in Opp. 16 n.4. In other words, Plaintiffs do not *really*

want to dismiss their claims with prejudice; rather, they wish to *conditionally* dismiss their claims pending appeal. Even if that procedural option existed under the Federal Rules of Civil Procedure—and it does not—appellate jurisdiction would still be lacking because the order dismissing their claims would not be sufficiently final to support jurisdiction under Section 1291.

II. The Ninth Circuit's voluntary dismissal rule not only violates basic principles of appellate jurisdiction, it also reflects a harmful judicial policy. The rule will waste judicial resources by permitting piecemeal appeals that the courts of appeals have no discretion to decline to hear, and it unfairly disadvantages defendants because it authorizes immediate appeals only for plaintiffs. These are precisely the problems that the Court sought to avoid in *Livesay* when it rejected the death knell doctrine, and there is no reason why they should be tolerated here. The Ninth Circuit's rule also undermines Rule 23(f), which permits both plaintiffs and defendants to seek interlocutory appeals of class certification rulings, while also providing courts of appeals with the discretion to decline to hear those appeals.

III. An alternative rule under which a named plaintiff is allowed to represent a class even if her own claims are permanently extinguished would also be problematic. This rule would invite the same problems as the Ninth Circuit's voluntary dismissal rule: it would waste judicial resources by encouraging piecemeal appeals and it would benefit only plaintiffs. The rule would also create pressure for named plaintiffs to forfeit potentially meritorious

claims for the benefit of a putative class and for class counsel to encourage their clients to dismiss their individual claims even when doing so is not in their clients' best interest.

ARGUMENT

I. The Ninth Circuit's Voluntary Dismissal Rule Cannot Satisfy the Requirements of Either Article III or Section 1291.

The Ninth Circuit's decision leaves open the question of what happens to Plaintiffs' individual claims on remand. Can Plaintiffs withdraw their voluntary dismissal and resume litigating their individual claims on the merits? Or are Plaintiffs' claims lost forever? The court of appeals suggested that Plaintiffs could resume litigating the claims that they voluntarily dismissed with prejudice, Pet App. 19a, and Plaintiffs have taken the position that their claims will be "revived." Br. in Opp. 16 n.4.

This question is important, but not because it determines whether the Ninth Circuit had jurisdiction to hear the appeal. Regardless of what would happen on remand, the court lacked appellate jurisdiction. Rather, the question is important because it determines *why* the court lacked jurisdiction. If Plaintiffs cannot revive their claims on remand, then the appeal does not present a live "case or controversy," as required by Article III. If Plaintiffs can revive their claims, then the order dismissing their claims was not sufficiently final to support jurisdiction under Section 1291. Either way, appellate jurisdiction was lacking, and the appeal should have been dismissed.

A. Plaintiffs' Dismissal With Prejudice Moots Their Appeal.

When a plaintiff voluntarily dismisses her claims with prejudice, those claims are, by definition, permanently extinguished at the plaintiff's request. Claims that are "dismissed with prejudice are gone forever." *Camesi v. Univ. of Pitt. Med. Ctr.*, 729 F.3d 239, 247-48 (3d Cir. 2013); *see also Fairley v. Andrews*, 578 F.3d 518, 521-22 (7th Cir. 2009) (claims dismissed with prejudice are "lost forever").

A plaintiff cannot appeal the voluntary dismissal of her own claims because "[l]itigants aren't aggrieved when the judge does what they want." *Fairley*, 578 F.3d at 521 (citing *Nashville, Chattanooga & St. Louis Ry. v. United States*, 113 U.S. 261 (1885)); *Woodard v. STR Corp.*, 170 F.3d 1043, 1044 (11th Cir. 1999) (judgment obtained "at the request of the plaintiff" was "not appealable" because there was "no 'case or controversy' in regard to it"); *see also* William P. Barnette, *The Limits of Consent: Voluntary Dismissals, Appeals of Class Certification Denials, and Some Article III Problems*, 56 S. Tex. L. Rev. 451, 459 (2015) ("Limits of Consent") ("Perhaps the most prominent, traditional example of the lack of concrete adverseness is when a plaintiff voluntarily dismisses her complaint.") (quoting *United States v. Procter & Gamble Co.*, 356 U.S. 677, 680 (1958)).

To satisfy Article III's "case or controversy" requirement, a plaintiff must have "a personal stake in the outcome of the controversy." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (internal quotation marks and citation omitted). The plaintiff's

"direct stake in the outcome" must continue throughout the litigation, including when the case is on appeal. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997) (internal quotation marks and citation omitted).

Applying these principles, this Court has repeatedly concluded that a plaintiff who has voluntarily dismissed her claims may not appeal the dismissal of those claims. *See, e.g., Procter & Gamble Co.*, 356 U.S. at 680 (noting the "the familiar rule that a plaintiff who has voluntarily dismissed his complaint may not sue out a writ of error"); *Deakins v. Monaghan*, 484 U.S. 193, 199-200 (1988) (voluntarily dismissed claims are "moot").

Likewise, numerous courts of appeals have rejected the argument that a plaintiff can dismiss claims "with prejudice" and yet retain the right to revive those claims later in the litigation. As the Third Circuit explained, this argument "reflects a fundamental misunderstanding of the nature of a dismissal with prejudice." *Camesi*, 729 F.3d at 247; *see also Page Plus of Atlanta, Inc. v. Owl Wireless, LLC*, 733 F.3d 658, 662 (6th Cir. 2013) ("If the possibility of finality alone establishes finality, the word has no meaning and § 1291 serves little purpose.").

These courts of appeals have correctly refused to allow plaintiffs to revive claims that were dismissed with prejudice because doing so ignores the distinction between "with prejudice" and "without prejudice" dismissals. As discussed above, claims dismissed *with* prejudice are "gone forever." *Camesi*, 729 F.3d at 247. In contrast, claims dismissed *with-*

out prejudice may be revived. *See, e.g.*, *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505 (2001) (dismissal without prejudice does not "bar[] the plaintiff from returning later, to the same court, with the same underlying claim").

As a result, if Plaintiffs' claims were truly dismissed with prejudice, then a live "case or controversy" no longer exists, and Plaintiffs' appeal should be dismissed as moot.

Nor is this a situation in which a plaintiff effectively lost on the merits of her *own claim*, and then invited dismissal in order to appeal that adverse ruling. In that situation, because the claims were adjudicated on the merits, the plaintiff has a personal stake in pressing her objections on appeal. Thus, in *Procter & Gamble*, 356 U.S. at 680-81, a district court ordered the United States to produce grand jury testimony in the course of a civil suit and, when the government refused and suggested dismissal, the court dismissed the suit with prejudice. The Supreme Court explained that, when the dismissal occurred, the government "had lost on the merits." *Id.* at 681. In other words, a win on appeal would revive the government's *own* claims.

This narrow exception does not apply here because Plaintiffs did not lose on the merits of their individual claims when the district court struck the class allegations. To the contrary, the district court's order—like a denial of class certification—had "no legal effect on the named plaintiff's ability to proceed with his individual claim." *Moses H. Cone Mem. Hosp. v. Mercury Const.*, 460 U.S. 1, 10 n.11 (1983).

Because the district court's ruling on Microsoft's motion to strike did not "touch the merits" of Plaintiffs' claims, *Gardner v. Westinghouse Broad. Co*, 437 U.S. 478, 482 (1978), Plaintiffs cannot appeal from the voluntary dismissal of their claims. *See also* Limits of Consent, *supra* at 477 ("The only exception [to the rule against appealing voluntary dismissals] is where the interlocutory ruling being challenge effectively operates a ruling on the merits . . . . By definition, a ruling denying class certification is procedural in nature and does not resolve the merits of the named plaintiffs' individual claim.").

Stated differently, Plaintiffs' desire to represent others in a putative class action is insufficient to give them a "personal stake in the outcome of the controversy," as required by Article III. *Summers*, 555 U.S. at 493 (internal quotation marks and citation omitted). When a plaintiff's "substantive claims become moot in the Art. III sense . . . the court retains no jurisdiction over the controversy of the individual plaintiffs." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980); *see also O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) (a named plaintiff who cannot "establish[] the requisite of a case or controversy" cannot "seek relief on behalf of himself or any other member of the class"). As the Fourth Circuit explained, "when a putative class plaintiff voluntarily dismisses the individual claims underlying a request for class certification, . . . there is no longer a 'self-interested party advocating' for class treatment in the manner necessary to satisfy Article III standing requirements." *Rhodes v. E.I. du Pont de Nemours & Co.*, 636 F.3d 88, 100 (4th Cir. 2011); *see also Camesi*, 729 F.3d at 247-48 (plaintiffs' "voluntary dismissal of

their claims with prejudice . . . has not only extinguished [their] individual claims, but also any residual representational interest that they may have once had").[3]

The well-settled rule precluding an appeal from a voluntary dismissal bars Plaintiffs' appeal here. Regardless of whether the district court erred in striking the class allegations from their complaint, because Plaintiffs' individual claims were dismissed with prejudice, those claims are gone forever and Plaintiffs have nothing to gain from a favorable ruling on appeal. Plaintiffs thus lack a "personal stake" in the appeal, and their appeal should be dismissed as moot.

B. Section 1291's Finality Requirement Is Not Satisfied If Plaintiffs May Revive Their Claims.

Plaintiffs attempt to avoid the consequences of their own choice to dismiss their claims with prejudice by treating it as a conditional dismissal.

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[3] In *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980), the Court recognized a limited exception to this rule to allow for the appeal of a denial of class certification where the named plaintiff's claims become moot through circumstances outside the plaintiff's control. *See* 445 U.S. at 403-04. In reaching this result, the Court expressly noted that it was *not* holding that this exception would apply where, as here, a plaintiff voluntarily arranges for his claims be dismissed. *Id.* at 404 n.10 ("We intimate no view as to whether a named plaintiff who settles the individual claim after denial of class certification may, consistent with Art. III, appeal from the adverse ruling on class certification.")

According to Plaintiffs, if they prevail on appeal, they may "revive" their claims on remand, and thus the dismissal with prejudice takes effect only if the district court's order striking their class allegations is affirmed on appeal. Br. in Opp. 16 n.4. This sort of conditional dismissal does not exist under the Federal Rules of Civil Procedure, and is not what the district court ordered. In any event, even if Plaintiffs could have conditionally dismissed their claims pending appeal, appellate jurisdiction would still be lacking.

Federal courts of appeals are vested only with the jurisdiction conferred on them by statute. Section 1291—the asserted basis for appellate jurisdiction here—provides jurisdiction only for appeals from "final decisions" of the district court. 28 U.S.C. § 1291. As the Court explained in *Livesay*, "[t]he finality requirement in § 1291 evinces a legislative judgment that '[r]estricting appellate review to "final decisions" prevents the debilitating effect on judicial administration caused by piecemeal appeal disposition of what is, in practical consequence, but a single controversy.'" 437 U.S. at 471 (quoting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974)).

In *Livesay*, the Court reaffirmed the principle that appellate review of interlocutory orders typically must wait until after final judgment, and unanimously held that an order denying class certification is not immediately appealable under Section 1291. *Id.* at 470. In reaching this result, the Court explained that "a district court's order denying or granting class status is inherently tentative," because the order "may be altered or amended before

the decision on the merits." *Id.* at 469 n.11 (internal quotation marks omitted). Given that the "refusal to certify a class is inherently interlocutory," any appeal of such an order under Section 1291 must wait until after the plaintiff has litigated his individual claims on the merits and final judgment is entered on those claims. *Id.* at 470. That is true even if the order denying class certification sounds the "death knell" for the plaintiffs' claims. *Id.*

Plaintiffs' voluntary dismissal rule cannot be squared with *Livesay*. Orders denying class certification or striking class allegations are just as tentative and subject to amendment now as they were when the Court decided *Livesay*. Yet, as under the death knell doctrine, the Ninth Circuit allows plaintiffs who do not wish to pursue their individual claims to take an immediate appeal of the class certification denial and, if they prevail on appeal, the litigation will resume on remand.[4] Because there is no practical difference between the Ninth Circuit's voluntary dismissal rule and the death knell doctrine, *Livesay* compels a holding that Section 1291 does not provide jurisdiction in this case.

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[4] If anything, the voluntary dismissal rule is even more capacious than the death knell doctrine. Under the death knell doctrine, plaintiffs did not merely have to dismiss their claims; they had to prove that it would be infeasible for them to pursue their claims on an individual basis. *Livesay*, 437 U.S. at 466. Under the Ninth Circuit's rule, plaintiffs can dismiss their claims and take an appeal at whim, even without a finding from the district court that it would be impractical to continue litigating their claims on an individual basis.

Attempting to distinguish *Livesay*, Plaintiffs contend that Section 1291's finality requirement is satisfied here because they voluntarily dismissed their individual claims with prejudice. Br. in Opp. 16-18. But, as discussed above, if plaintiffs truly dismissed their claims with prejudice, they would have no personal stake in an appeal and their case would be moot. Thus, Plaintiffs' entire gambit in this case depends on the argument that the dismissal of their claims was *not*, in fact, with prejudice. But if that is correct—and Plaintiffs' can revive their claims on remand—then there is no appellate jurisdiction under Section 1291 for all the same reasons recognized by this Court in *Livesay*.

II. The Ninth Circuit's Voluntary Dismissal Rule Wastes Judicial Resources and Distorts Class Action Practice.

If Plaintiffs' claims were truly dismissed with prejudice, then their appeal is moot. If Plaintiffs' claims were not dismissed with prejudice, then there is no final judgment under Section 1291. Any holding to the contrary would not only be contrary to settled law, it also would undermine the policies embodied in Section 1291 by encouraging piecemeal appeals, unfairly prejudice class-action defendants, and undermine Federal Rule of Civil Procedure 23(f).

A. The Ninth Circuit's Voluntary Dismissal Rule Suffers from the Same Flaws as the Death Knell Doctrine.

In rejecting the death knell doctrine, the Court recognized at least two fundamental flaws in the doctrine: (i) it wastes judicial resources by encouraging

piecemeal appeals, and (ii) it applies only to appeals by plaintiffs of orders denying class certification, even though defendants have an equally strong interest in obtaining immediate appellate review of orders granting class certification. *See Livesay*, 437 at 470-74. The Ninth Circuit's voluntary dismissal rule has the same flaws and should be similarly rejected.

1. The "principle vice" of the death knell doctrine was that it "authorize[d] indiscriminate interlocutory review of decisions made by the trial judge." *Id.* at 474. This Court has long recognized that piecemeal appeals can have a "debilitating effect on judicial administration." *Id.* at 471 (internal quotation marks and citation omitted). Yet the death knell doctrine encouraged piecemeal appeals, because it allowed a plaintiff to appeal an order denying class certification before litigating her individual claims on the merits. *See id.* at 474. As the Court recognized, "[t]he potential waste of judicial resources is plain." *Id.* at 473.

As this case demonstrates, the Ninth Circuit's voluntary dismissal rule will also waste judicial resources by encouraging piecemeal appeals. In this case, the court of appeals held that the district court erred in striking the class allegations because the district court relied on a ruling that had since been undermined by an intervening Ninth Circuit decision. Pet. App. 18a-19a. The Ninth Circuit clearly stated that it "express[ed] no opinion," however, on whether a class should be certified. Pet. App. 19a. As a result, the district court must consider on remand any grounds for opposing class certification

that Microsoft may offer in response to a motion to certify the putative class. If the district court denies class certification on any of those grounds, the plaintiffs can voluntarily dismiss their claims again and take another appeal.

To make matters worse, this potential waste of judicial resources is not limited to piecemeal appeals of orders denying class certification. Instead, plaintiffs will likely argue that the voluntary dismissal rule can be used to obtain appellate review of any interlocutory order for which they desire immediate review. In rejecting the death knell doctrine, this Court acknowledged that there was no principled basis for limiting the doctrine to class certification orders. *See Livesay*, 437 U.S. at 470. The Court explained: "[I]f the 'death knell' doctrine has merit, it would apply equally to the many interlocutory orders in ordinary litigation—rulings on discovery, on venue, on summary judgment—that may have such tactical economic significance that a defeat is tantamount to a 'death knell' for the entire case." *Id.* The Third Circuit recently made the same point in rejecting the voluntary dismissal rule. *See Camesi*, 729 F.3d at 245-46 (If the court "were to permit such a procedural sleight-of-hand, there is nothing to prevent litigants from employing such a tactic to obtain review of discovery orders, evidentiary rulings, or any of the myriad decisions that a district court makes before it reaches the merits of an action.").

A case currently pending before the Ninth Circuit demonstrates that this concern is real. In *Strafford v. Eli Lilly and Company*, after the district court denied the plaintiffs' motions for class certifica-

tion, plaintiffs moved to dismiss their individual claims voluntarily with prejudice, and the district court granted their motion. *See* Order, *Strafford v. Eli Lilly & Co.*, No. 12-9366 (C.D. Cal. Oct. 26, 2015) (ECF Dkt. No. 203). The plaintiffs subsequently appealed, challenging not only the class certification denials but also the district court's interlocutory rulings on motions to dismiss and for partial summary judgment, and on a variety of discovery issues. *See* Notice of Appeal, *Strafford v. Eli Lilly & Co.*, No. 12-9366 (C.D. Cal. Nov. 23, 2015) (ECF Dkt. No. 204). The Ninth Circuit recently denied a motion to stay the appeal pending this Court's ruling in this case, *see* Order, *Strafford v. Eli Lilly & Co.*, No. 15-56808 (9th Cir. Mar. 7, 2016) (ECF Dkt. No. 6), and thus the parties will brief a wide range of interlocutory orders in an appeal brought under the voluntary dismissal rule.

2. This Court also concluded that the death knell doctrine was problematic because it "operate[d] only in favor of plaintiffs." *Livesay*, 437 U.S. at 476. As the Court explained, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Id.* The Court recently reiterated that class actions present a significant "risk of 'in terrorem' settlements," because defendants "[f]aced with even a small chance of a devastating loss . . . will be pressured into settling questionable claims." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011); *see also Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) ("A court's

decision to certify a class . . . places pressure on the defendant to settle even unmeritorious claims."). Given these risks, obtaining immediate appellate review of class certification orders "will often be of critical importance to defendants." *Livesay*, 437 U.S. at 476.

Like the discredited death knell doctrine, the Ninth Circuit's voluntary dismissal rule places class-action defendants at an unfair disadvantage. Because only plaintiffs have claims to dismiss, only plaintiffs can use the Ninth Circuit's rule to obtain immediate review of class certification orders. Even though an order certifying a class can have dramatic effects on a defendant, defendants have no comparable method for manufacturing an allegedly final order or for otherwise generating an immediate appeal as a matter of right. The Court should reject the Ninth Circuit's rule, just as it did the death knell doctrine.

B. The Ninth Circuit's Rule Upsets the Balance Struck by Federal Rule of Civil Procedure 23(f).

The Ninth Circuit's voluntary dismissal rule also interferes with the discretionary review of class certification orders provided by Rule 23(f). Adopted in 1998, Rule 23(f) provides for immediate appellate review of class certification orders in limited circumstances. *See* Fed. R. Civ. P. 23(f).[5] This rule

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[5] Rule 23(f) provides, in relevant part: "A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to (...continued)

did not revive the death knell doctrine that this Court rejected in *Livesay*, 437 U.S. at 463. Instead, it allows for immediate appellate review only in cases selected by the court of appeals, and it does so in a way that avoids the problems created by the death knell doctrine and the Ninth Circuit's voluntary dismissal rule.

1. Rule 23(f) minimizes the possibility of piecemeal appeals by making interlocutory appeals the exception, not the rule. Rather than creating a right to appeal all class certification orders, Rule 23(f) permits a party to petition for appellate review, and the court of appeals exercises discretion to decide whether to hear the case. Fed. R. Civ. P. 23(f). Courts have stated that "Rule 23(f) review should be a rare occurrence," because interlocutory appeals "are disruptive, time-consuming, and expensive." *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 955, 959 (9th Cir. 2005).

The discretion provided to courts under Rule 23(f) would become meaningless if this Court upholds the Ninth Circuit's voluntary dismissal rule. Under the Ninth Circuit's rule, a plaintiff can force a court of appeals to hear an immediate appeal of an order denying class certification, even if the court already denied a Rule 23(f) petition. Indeed, that is precisely what happened in this case. Pet. App. 10a, 12a. In order to further Rule 23(f)'s objective of giv-

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appeal is filed with the circuit clerk within 14 days after the order is entered." Fed. R. Civ. P. 23(f).

ing courts—and not plaintiffs—the discretion to determine which class certification orders deserve immediate appellate review, the Court should reject the voluntary dismissal rule.

2. Rule 23(f) also treats plaintiffs and defendants equally by allowing any party to petition for appellate review of class certification orders. Fed. R. Civ. P. 23(f). The Committee Note explains that the rule applies to all parties because all parties have an interest in seeking immediate appellate review:

> An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits on an individual claim that, standing alone, is far smaller than the costs of litigation. An order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.

Fed. R. Civ. P. 23 Committee Note (1998).

Consistent with this Committee Note, courts of appeals have treated plaintiffs and defendants similarly in applying Rule 23(f). As the Seventh Circuit has explained, "just as a denial of class status can doom the plaintiff, so a grant of class status can put considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight." *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999). A recent study

found that Rule 23(f) petitions filed by plaintiffs and defendants are granted at roughly the same rate.[8]

All parties will no longer be treated equally if the Court upholds the Ninth Circuit's voluntary dismissal rule. Defendants can still take an immediate appeal of an order granting class certification only when a Rule 23(f) petition is granted. Plaintiffs, in contrast, can first petition for review under Rule 23(f), and—if the petition is denied—they can then take an appeal as of right under Section 1291 and the voluntary dismissal rule.

In sum, Rule 23(f) reflects the policy judgments that immediate appeals of class certification orders should be allowed only when permitted by the courts of appeals, and that the opportunity to appeal should be available on equal terms to both plaintiffs and defendants. Like the death knell doctrine before it, the Ninth Circuit's voluntary dismissal rule frustrates these objectives by allowing plaintiffs, but not defendants, to appeal orders denying class certification whenever they prefer an immediate appeal over litigating the merits of their claims.

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[8] Courts of appeals have granted 20.5% of the petitions filed by plaintiffs, and 24.8% of the petitions filed by defendants. *See* John Beisner et al., *Study Reveals US Courts of Appeals Are Less Receptive to Reviewing Class Certification Rulings* (Apr. 29, 2014), http://bit.ly/1GNGoI5.

III. The Ninth Circuit's Voluntary Dismissal Rule Cannot Be Saved By Allowing Plaintiffs To Pursue Appeal After a Permanent Dismissal of Their Claims.

Plaintiffs have never argued that, even if their claims cannot be revived, they may still appeal the order striking the class allegations from their complaint. But even if this argument were not waived, the Court should still reject it. The Ninth Circuit's voluntary dismissal rule cannot be saved by allowing a named plaintiff who has truly dismissed her claim with prejudice to nonetheless represent a class. That is because the desire to represent a class is not enough to satisfy Article III's "case or controversy" requirement. *See* Part I.A.

Moreover, even ignoring the Article III problems, the Ninth Circuit's voluntary dismissal rule would create the very problems that Rule 23(f) was designed to avoid. The potential waste of judicial resources from piecemeal appeals would still exist—the only difference would be that each appeal would be taken by a different named plaintiff. *See supra* pp. 16, 19-20. And the rule would still unfairly disadvantage defendants, because only plaintiffs can manufacture a supposedly final judgment by dismissing their claims. *See supra* p. 18.

But the voluntary dismissal rule would also create additional problems if a plaintiff could continue to represent a class after her claim had been dismissed with prejudice. If a plaintiff could give up her claims for the benefit of the putative class, her personal interests would often be at odds with the

interests of her lawyer. This is especially true when the lawyer has taken the case on a contingency fee, as is typical for class actions. The plaintiff may prefer to continue litigating her individual claims even if the potential recovery is relatively small, because a relatively small recovery is better than no recovery at all. But the class action lawyer often takes a plaintiff's case on a contingency fee only for the potential of a class-wide recovery. That lawyer has little incentive to continue representing the plaintiff on her individual claims, and thus will have every incentive to discourage the plaintiff from continuing to litigate her claims, even if they have merit.

This Court has repeatedly sought to avoid interpreting class action rules in a way that creates a conflict between the interests of plaintiffs and class counsel. For example, in *Standard Fire Insurance Co. v. Knowles*, 133 S. Ct. 1345 (2013), the Court unanimously rejected the common tactic of plaintiffs' lawyers' "stipulating away" putative class claims above $5 million to evade jurisdiction under the Class Action Fairness Act. As the Court recognized, this practice impermissibly allowed named plaintiffs and their lawyers to give up claims of absent class members. *Id.* at 1348-49. Similarly, in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), the Court rejected an interpretation of Rule 23(b)(2) that would have "create[d] perverse incentives for class representatives to place at risk potentially valid claims for monetary relief." *Id.* at 2559.

The potential for conflicts of interest is even greater here. If counsel is successful in persuading the named plaintiff to dismiss her claims, counsel

can control the litigation on appeal without accountability to a client with a personal interest in the action. It is a foundational principle of legal ethics that an attorney should abide by the client's preferences and litigation goals, rather than his or her own self-interest. *See* Model R. of Prof'l Conduct 1.2(a). But here the client's preferences would be irrelevant because the client no longer has an interest in the litigation. As a result, the case would become a matter of "a lawyer who no longer has a client." *See Geraghty*, 445 U.S. at 424 (Powell, J., dissenting).

Class litigation is already "dysfunctional," because often "the principals [i.e., the plaintiffs] cannot effectively monitor their agent [i.e., their lawyer]." John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 Colum. L. Rev. 370, 371 (2000). Class action lawyers often "ignore the preferences of individual class members" and "define the goals of the litigation differently than they otherwise would." *Id.* at 379. This happens even when class counsel have an interested client to whom they owe fiduciary duties. The problem will only be exacerbated if class counsel can pursue appeals on behalf of a putative class without a client who has a personal stake in the case's outcome.

To minimize these problems, the Court should reject the Ninth Circuit's voluntary dismissal rule and hold that the court of appeals lacked jurisdiction to hear Plaintiffs' appeal. That is true regardless of whether the Ninth Circuit would allow a plaintiff to revive her claims on remand.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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